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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14 WESTERN DIVISION

14 GLOBAL MUSIC RIGHTS, LLC,

15 Plaintiff,

16 vs.

17 RADIO MUSIC LICENSE
COMMITTEE, INC. et al.,

18 Defendants.

No. 2:16-cv-9051-TJH(ASx)

STATEMENT OF INTEREST
OF THE UNITED STATES

The Honorable Terry J. Hatter, Jr.

Under Submission
September 9, 2019

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INTEREST OF THE UNITED STATES

The United States submits this Statement pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal court.

The United States enforces the federal antitrust laws and has a strong interest in their correct application. Competitors' naked agreements to fix prices are one of the most pernicious forms of anticompetitive restraints that violate Section 1 of the Sherman Act, 15 U.S.C. § 1. Private, civil enforcement is an important supplement to the United States' efforts to eliminate these unlawful practices, so long as that enforcement is consistent with the law.

The present case involves an alleged buyers' cartel—a form of cartel that can be equally destructive of competition as a sellers' cartel, even though it is discussed less frequently in the case law. Because of this disparity, the United States offers this Statement to describe the legal standards governing whether an alleged agreement among buyers constitutes a per se illegal restraint of trade in violation of Section 1. This Statement assumes the truth of the allegations of the complaint in its analysis, as is required on a motion for judgment on the pleadings. The United States takes no position on the truth of the facts alleged.

STATEMENT

This case concerns music licensing. According to the operative complaint, Global Music Rights, LLC (GMR) is a performing rights organization (PRO) that aggregates the public-performance rights of its affiliated songwriters and sells licenses bundling together those rights. 1st Am. Compl. ¶ 4 (Dkt. No. 23). GMR offers licenses to a wide variety of buyers, including owners of commercial terrestrial (AM

1 or FM) radio stations. *Id.* ¶¶ 4-5. Radio Music Licensing Committee, Inc. (RMLC) is
 2 an entity that negotiates with PROs for public-performance licenses on behalf of radio
 3 stations representing 90% of the country’s terrestrial radio revenue. *Id.* ¶¶ 1-2.

4 GMR and RMLC have sued each other, with each alleging the other is, among
 5 other things, an illegal cartel in violation of Section 1 of the Sherman Act, 15 U.S.C.
 6 § 1. *See* 1st Am. Compl. (Dkt. No. 23); 2d Am. Compl., *RMLC v. GMR*, No. 2:19-cv-
 7 3957 (C.D. Cal. June 20, 2019) (Dkt. No. 163). Currently pending before the court
 8 are RMLC’s motion for judgment on the pleadings (Dkt. No. 95) and GMR’s motion
 9 to dismiss, *RMLC v. GMR*, No. 2:19-cv-3957 (C.D. Cal. July 11, 2019) (Dkt.
 10 No. 167). This Statement addresses the legal requirements for a buyers’ cartel and
 11 therefore focuses solely on the briefing related to RMLC’s pending motion.

12 ARGUMENT

13 **I. Agreements Among Buyers To Violate The Antitrust Laws Are Just As** 14 **Pernicious As Agreements Among Sellers.**

15 Section 1 of the Sherman Act bars “[e]very contract, combination in the form of
 16 trust or otherwise, or conspiracy, in restraint of trade or commerce among the several
 17 States.” 15 U.S.C. § 1. Courts have long interpreted the Act to prohibit only
 18 “unreasonable” restraints of trade. *E.g., Arizona v. Maricopa Cty. Med. Soc’y*, 457
 19 U.S. 332, 343 (1982); *N. Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). The
 20 reasonableness of most restraints is assessed under the “rule of reason.” *Maricopa*
 21 *Cty.*, 457 U.S. at 343. “As its name suggests, the rule of reason requires the factfinder
 22 to decide whether under all the circumstances of the case the restrictive practice
 23 imposes an unreasonable restraint on competition.” *Id.*

1 Not all restraints of trade are governed by the rule of reason. *N. Pac. Ry.*, 356
2 U.S. at 5. Some categories of restraints are so inherently destructive of competition
3 that they are subject to the per se rule, under which they are “deemed to be unlawful in
4 and of themselves.” *Id.* By “treating categories of restraints as necessarily illegal,”
5 the per se rule “eliminates the need to study the reasonableness of an individual
6 restraint.” *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886
7 (2007); see *United States v. Mfrs.’ Ass’n of Relocatable Bldg. Indus.*, 462 F.2d 49, 51-
8 52 (9th Cir. 1972) (discussing per se rule). Examples of per se illegal restraints
9 include agreements among competitors to fix prices, *e.g.*, *Catalano, Inc. v. Target*
10 *Sales, Inc.*, 446 U.S. 643, 647 (1980), rig bids, *e.g.*, *United States v. Joyce*, 895 F.3d
11 673, 677 (9th Cir. 2018), or divide markets, *e.g.*, *Palmer v. BRG of Ga., Inc.*, 498 U.S.
12 46, 49-50 (1990). See also *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293
13 (6th Cir. 1898) (in case involving horizontal price fixing, bid rigging, and market
14 allocation, rejecting a reasonable-prices defense because “we do not think that at
15 common law there is any question of reasonableness open to the courts with reference
16 to such a contract”), *aff’d as modified in other part*, 175 U.S. 211 (1899). Such
17 restraints are referred to as “naked” restraints because they are not the product of
18 legitimate collaboration and thus “can have no purpose other than restricting output
19 and raising prices.” *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d
20 210, 229 (D.C. Cir. 1986) (Bork, J.).

21 When competitors agree to a restraint that is per se illegal, it does not matter
22 whether they are buyers or sellers of goods or services. Per se rules apply to
23 agreements among competing buyers in the same way that they apply to competing
24 sellers because the Sherman Act protects competition not only in output markets

1 where sellers compete to sell goods or services, but also in input markets where
2 businesses compete to purchase various inputs. *See Weyerhaeuser Co. v. Ross-*
3 *Simmons Hardwood Lumber Co.*, 549 U.S. 312, 323 (2007) (explaining, in a Section 2
4 case, that “[j]ust as sellers use output prices to compete for purchasers, buyers use bid
5 prices to compete for scarce inputs”). The Sherman Act “does not confine its
6 protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it
7 immunize the outlawed acts because they are done by any of these.” *Mandeville*
8 *Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). Rather, the Act “is
9 comprehensive in its terms and coverage, protecting all who are made victims of the
10 forbidden practices by whomever they may be perpetrated.” *Id.*

11 In *Mandeville Island Farms*, for example, the Supreme Court concluded that it
12 was “clear” that an agreement among sugar refiners to pay a uniform price to sugar
13 beet growers “is the sort of combination condemned by the Act, even though the
14 price-fixing was by *purchasers*, and the persons specially injured under the treble
15 damages claim are sellers, not customers or consumers.” 334 U.S. at 235 (footnotes
16 omitted; emphasis added). In *Joyce*, 895 F.3d at 676, 677, similarly, the Ninth Circuit
17 described an agreement among potential *buyers* of foreclosed real property “to
18 suppress competition by refraining from bidding against each other at public auctions”
19 as “classic bid rigging.” Because such “bid rigging is a form of horizontal price
20 fixing,” it is “a per se violation of the Sherman Act.” *Id.* at 677. Finally, in *United*
21 *States v. Brown*, 936 F.2d 1042, 1044, 1045 (9th Cir. 1991), the Ninth Circuit
22 determined that an agreement among billboard advertising companies to “refrain from
23 bidding on each other’s former [billboard] leaseholds for a period of one year after the
24 space was lost or abandoned” “clearly allocated markets between the two billboard

1 companies.” It did not matter that the agreement concerned an input market (billboard
 2 leaseholds) for which the defendants were competing *buyers* because “[a] market
 3 allocation agreement between competitors at the same market level is a classic per se
 4 antitrust violation.” *Id.* at 1045.

5 For per se illegal restraints, “no showing of so-called competitive abuses or
 6 evils which those agreements were designed to eliminate or alleviate may be
 7 interposed as a defense.” *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218
 8 (1940). In the price-fixing context, for example, “the reasonableness of the prices”
 9 fixed is irrelevant. *Id.* at 229. The Supreme Court has explained: “Whatever
 10 economic justification particular price-fixing agreements may be thought to have, the
 11 law does not permit an inquiry into their reasonableness. They are all banned because
 12 of their actual or potential threat to the central nervous system of the economy.” *Id.* at
 13 224 n.59; *see also, e.g., Maricopa Cty.*, 457 U.S. at 348 (stating, in case concerning a
 14 sellers’ price-fixing agreement, that “[o]ur decisions foreclose the argument that the
 15 agreements at issue escape per se condemnation because they . . . fix *maximum* prices”
 16 (emphasis added)). Accordingly, in a buyer-cartel case, it is no defense that the
 17 agreement lowered the prices consumers pay. *See Knevelbaard Dairies v. Kraft*
 18 *Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) (rejecting, as a matter of law, the
 19 defense that “a conspiracy to depress prices would not harm consumers but benefit
 20 them”).

21 **II. Certain of RMLC’s Arguments Misstate The Law On Buyers’ Price-Fixing** 22 **Agreements And Should Be Rejected.**

23 In its briefing in support of its motion for judgment on the pleadings, RMLC
 24 makes several statements about the law governing price-fixing agreements generally,

1 and buyers’ price-fixing agreements specifically, that are inconsistent with the case
 2 law. These misstatements concern the intent required to join a price-fixing
 3 conspiracy, the nature of the agreement required to constitute price fixing, and the
 4 extent to which the success of a price-fixing conspiracy is a necessary element of a
 5 Section 1 claim. The United States addresses each below.

6 **A. Intent**

7 Section 1 “does not prohibit all unreasonable restraints of trade . . . but only
 8 restraints effected by a contract, combination, or conspiracy.” *Bell Atl. Corp. v.*
 9 *Twombly*, 550 U.S. 544, 553 (2007) (brackets omitted; quoting *Copperweld Corp. v.*
 10 *Indep. Tube Corp.*, 467 U.S. 752, 775 (1984)). A plaintiff alleging a Section 1
 11 violation must plead factual allegations plausibly showing that the defendant and its
 12 co-conspirator(s) “had a conscious commitment to a common scheme designed to
 13 achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S.
 14 752, 764 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d
 15 105, 111 (3d Cir. 1980)). When a plaintiff alleges the existence of a per se illegal
 16 restraint, that “necessarily illegal” restraint is itself the unlawful objective. *Leegin*,
 17 551 U.S. at 886. For that reason, “[o]nce the agreement’s existence is established, no
 18 further inquiry into the practice’s actual effect on the market or the parties’ intentions
 19 is necessary to establish a § 1 violation.” *In re Musical Instruments & Equip.*
 20 *Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015).

21 In its motion for judgment on the pleadings, RMLC suggests that GMR was
 22 required to plead an additional fact to state a per se claim under Section 1: that
 23 “RMLC’s members actually agreed with each other to do something that they
 24 *intended would harm competition.*” RMLC Mot. 10 (emphasis added). That

1 suggestion is contrary to established law. In civil cases in which a plaintiff has
 2 pleaded horizontal price fixing, bid rigging, or market allocation, just like in criminal
 3 cases in which those offenses are charged, a plaintiff “is not required to ‘prove
 4 specific intent to produce anticompetitive effects.’” *Joyce*, 895 F.3d at 679 (criminal
 5 case; quoting *United States v. Alston*, 974 F.2d 1206, 1213 (9th Cir. 1992)); *see also*
 6 *In re Musical Instruments*, 798 F.3d at 1191 (explaining principle in a civil case).

7 RMLC never acknowledges this authority, but instead incorrectly argues that a
 8 Section 1 plaintiff must plead plausibly that the defendant “intended to harm or
 9 restrain trade or commerce.” RMLC Mot. 10 (quoting *Kendall v. VISA U.S.A., Inc.*,
 10 518 F.3d 1042, 1047 (9th Cir. 2008)). The precedent that RMLC quotes, however, is
 11 the Ninth Circuit’s description of what a *rule-of-reason* claim requires. *See Kendall*,
 12 518 F.3d at 1047 (citing *Les Shockley Racing, Inc. v. Nat’l Hot Rod Ass’n*, 884 F.2d
 13 504, 507 (9th Cir. 1989), which in turn described what “[t]he rule of reason requires
 14 [of] a claimant”). There is no similar requirement for a per se claim. *In re Musical*
 15 *Instruments*, 798 F.3d at 1191. Contrary to RMLC’s suggestion, therefore, whether
 16 GMR has plausibly pleaded that RMLC intended to harm commerce is irrelevant to
 17 the question whether GMR has stated a per se claim.

18 **B. Price Fixing**

19 To plead a per se violation of the Sherman Act, a plaintiff must allege that the
 20 defendant and its co-conspirator(s) agreed to a course of conduct that falls within a
 21 category of restraints “deemed to be unlawful in and of themselves.” *N. Pac. Ry.*, 356
 22 U.S. at 5. When, as here, a plaintiff claims that a defendant was part of a conspiracy
 23 among competitors to fix prices, the plaintiff must plausibly plead that two or more
 24 competitors “agreed upon” pricing or a component of pricing. *Socony-Vacuum*, 310

U.S. at 223. An agreement would constitute price fixing, for example, “if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices.” *Id.* at 222. Additional examples include agreements that involve “an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, [or] a factor which prevents the determination of those prices by free competition alone.” *Id.* at 223. For all price-fixing agreements, “the machinery employed by a combination for price-fixing is immaterial,” *id.*, because “[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition,” *id.* at 213 (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927)).

1. Categorization of Alleged Restraint

RMLC wrongly argues that GMR’s complaint does not plead price fixing but rather, at most, describes a group-boycott claim. *See* RMLC Mot. 19; RMLC Reply 3-8, 18-19. The two categories of restraints—price fixing and group boycott—are not, however, mutually exclusive. Parties can reach an agreement that “involves not only a boycott but also a horizontal price-fixing arrangement.” *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 436 n.19 (1990).

Superior Court Trial Lawyers is an example of a case in which an agreement qualified as both types of restraints. In that case, “a group of lawyers agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government increased the lawyers’ compensation.” 493 U.S. at 414. “Prior to the boycott CJA [Criminal Justice Act] lawyers were in competition with one another, each deciding independently whether and how often to offer to

1 provide services to the District at CJA rates.” *Id.* at 422. “The agreement among the
 2 CJA lawyers was designed to obtain higher prices for their services and was
 3 implemented by a concerted refusal to serve an important customer in the market for
 4 legal services and, indeed, the only customer in the market for the particular services
 5 that CJA regulars offered.” *Id.* at 422-23. The Supreme Court held that “[t]his
 6 constriction of supply is the essence of ‘price-fixing,’ whether it be accomplished by
 7 agreeing upon a price, which will decrease the quantity demanded, or by agreeing
 8 upon an output, which will increase the price offered.” *Id.* at 423 (quoting court of
 9 appeals). Without deciding whether the agreement was best characterized as a group
 10 boycott or price fixing, the Court ruled that “[t]he horizontal arrangement among these
 11 competitors was unquestionably a ‘naked restraint’ on price and output” governed by
 12 the per se rule. *Id.* at 423, 436 & n.19.

13 *Superior Court Trial Lawyers* thus exemplifies the general principle that
 14 implicit (or on occasion explicit) in many price-fixing agreements (that is, agreements
 15 to sell at a particular price or according to a particular price structure) is a
 16 commitment that also shares the characteristics of a boycott: that is, a commitment not
 17 to sell at other prices or according to other price structures. This general principle has
 18 long been recognized in antitrust law. *See generally* George J. Stigler, *A Theory of*
 19 *Oligopoly*, 72 J. Pol. Econ. 44, 46 (1964) (discussing how cartels try to prevent
 20 “significant deviations from the agreed-upon prices”). It is equally applicable to the
 21 sell-side and, as relevant here, the buy-side. For instance, an analogous restraint to
 22 *Superior Court Trial Lawyers* on the buy-side is a restraint in which a group of
 23 competing buyers agreed among themselves not to purchase from a seller unless that
 24 seller agreed to sell below a particular price. Just as in *Superior Court Trial Lawyers*,

1 such an agreement among competitors would include both a refusal-to-deal
2 component and a price-fixing component. Accordingly, and contrary to RMLC's
3 suggestion otherwise, the agreement would be per se illegal because it would
4 constitute a naked restraint among the competing buyers on price or quantity
5 purchased. *Cf. Superior Court Trial Lawyers*, 493 U.S. at 436 & n.19.

6 *Superior Court Trial Lawyers* also makes clear that RMLC misstates the law
7 when it argues that "the Ninth Circuit has made clear [in *Adaptive Power Sols., LLC v.*
8 *Hughes Missile Sys. Co.*, 141 F.3d 947, 948 (9th Cir. 1998)] that the type of group
9 boycott claim alleged here is not a price fixing claim as a matter of law." RMLC
10 Mot. 19. *Adaptive* simply does not support RMLC's broad categorical rule (nor could
11 it in light of *Superior Court Trial Lawyers*). *Adaptive* stands for the much more
12 modest proposition that a refusal to deal, without an agreement as to pricing, is not
13 price-fixing. *See* 141 F.3d at 950 (distinguishing a "refus[al] to deal with a high-
14 priced supplier" *at all* from "a price-fixing conspiracy among competitors who agree
15 among themselves to fix their prices"). *Adaptive* did not involve a situation in which
16 competitors allegedly both agreed on pricing and agreed not to deal with a seller, as
17 GMR argues it has pleaded here.

18 In any event, GMR defends its complaint on the ground that it sufficiently
19 pleads "naked price-fixing among horizontal competitors" by alleging that "radio
20 companies that normally compete against each other for access to musical content
21 agreed with one another to fix the maximum price any of them would pay for that
22 content." GMR Opp'n 1 (emphasis removed). Because "the party who brings a suit is
23 master to decide what law he will rely upon," *The Fair v. Kohler Die & Specialty Co.*,
24 228 U.S. 22, 25 (1913), this Court should decide whether GMR has plausibly pleaded

1 price fixing, regardless of whether its allegations could also, or should instead, be
2 categorized as describing a group boycott.

3 **2. Agreement as to Third-Party Price Setting**

4 RMLC peddles a similarly simplistic argument when it wrongly claims that
5 GMR has failed to state a price-fixing claim because it alleges merely an agreement
6 among buyers to insist that the sales price be determined by a third party (here, an
7 arbitrator), not an agreement on price itself. RMLC Mot. 19; RMLC Reply 4-8, 19.
8 The mere fact, however, that a third party decides the price on which competitors will
9 agree does not, standing on its own, remove the restraint from the price-fixing
10 category. That restraint is still an agreement to charge the same prices and thus still
11 eliminates competition on price.

12 The Ninth Circuit's conclusion in *Knevelbaard Dairies* that competitors can
13 engage in price fixing by manipulating inputs for a benchmark rate that is set by an
14 independent third party illustrates this point. 232 F.3d at 979. There, the Ninth
15 Circuit held that the milk-producer plaintiffs' allegations—that purchasers of bulk
16 milk and cheese unlawfully suppressed the state's minimum price for milk produced
17 in the state—stated a claim of per se illegal buy-side price fixing. *Id.* at 986-87
18 (Cartwright Act case relying on Sherman Act decisions concerning the per se rule).
19 Specifically, the plaintiffs had alleged that the purchasers coordinated their purchases
20 of bulk cheese at auction in order to manipulate the market bulk-cheese price, which
21 in turn was used by a third party—a state agency—to set the minimum milk price. *Id.*
22 at 982.

23 RMLC is therefore wrong to argue that a third party's determination of the price
24 at which competitors agree to buy or sell a good or service is enough to remove the

1 agreement from the price-fixing category. The agreement not to compete on price is
 2 the per se illegal restraint, and the “machinery employed” to decide the agreed-upon
 3 price—whether it is the manipulation of a benchmark as in *Knevelbaard Dairies* or, as
 4 here, use of an arbitrator—is immaterial. *Socony-Vacuum Oil Co.*, 310 U.S. at 223.

5 **C. Success of Conspiracy**

6 Finally, it is “well settled that conspiracies under the Sherman Act are not
 7 dependent on any overt act other than the act of conspiring.” *Socony-Vacuum*, 310
 8 U.S. at 224 n.59. As the Supreme Court has explained, “[i]t is the ‘contract,
 9 combination * * * or conspiracy, in restraint of trade or commerce’ which § 1 of the
 10 Act strikes down, whether the concerted activity be wholly nascent or abortive on the
 11 one hand, or successful on the other.” *Id.* (ellipsis in original). Accordingly, “a
 12 conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it
 13 is not established that the conspirators had the means available for accomplishment of
 14 their objective, and though the conspiracy embraced but a part of the interstate or
 15 foreign commerce in the commodity.” *Id.*

16 RMLC’s reply brief incorrectly argues that a buyers’ price-fixing agreement
 17 must be successful to violate Section 1. According to RMLC, if the seller does not
 18 accept the buyers’ agreed-upon price, the buyers’ agreement is merely an “attempt to
 19 fix prices,” and therefore lawful. *See* RMLC Reply 6 & n.4 (quoting *Liu v. Amerco*,
 20 677 F.3d 489, 493 (1st Cir. 2012)). RMLC conflates the requirement that there be an
 21 *agreement* to fix prices with the *successful execution* of that agreement.

22 In the *Liu* case that RMLC quotes, the defendant allegedly made “express
 23 proposals to a competitor to raise prices” that were “spurned.” 677 F.3d at 494-95.
 24 There was, accordingly, no “contract, combination . . . or conspiracy” between the

1 competitors that could violate Section 1. If there had been such an agreement,
2 whether the conspiring competitors were successful in convincing customers to make
3 purchases at their agreed price would be irrelevant to the question whether there had
4 been a Section 1 violation (although it might affect what if any recovery would be
5 available to a private plaintiff). For as the Supreme Court has long held, “a
6 conspiracy to fix prices violates § 1 of the Act,” and no matter “whether the concerted
7 activity be wholly nascent or abortive on the one hand, or successful on the other.”
8 *Socony-Vacuum*, 310 U.S. at 224 n.59; *see also Nash v. United States*, 229 U.S. 373,
9 378 (1913) (explaining that Section 1 “does not make the doing of any act other than
10 the act of conspiring a condition of liability”); *United States v. SKW Metals & Alloys*,
11 *Inc.*, 195 F.3d 83, 92 (2d Cir. 1999) (“Entry into an agreement to fix prices—even if
12 the implementation of such an agreement is unsuccessful—is the illegal conduct under
13 the Sherman Act, 15 U.S.C. § 1.”); *United States v. Hayter Oil Co.*, 51 F.3d 1265,
14 1273 (6th Cir. 1995) (“the success of a price-fixing agreement is irrelevant for
15 establishing a violation of § 1 of the Sherman Act”). This Court should therefore
16 reject RMLC’s argument that GMR cannot state a price-fixing claim because,
17 according to the operative complaint, GMR did not accept RMLC’s alleged price
18 demand.

CONCLUSION

For the foregoing reasons, the United States respectfully recommends that the Court apply the above-discussed law when it evaluates whether GMR has stated a per se price-fixing claim against RMLC.

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Respectfully submitted.

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